IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

Number 22.

JAMES P. WESBERRY, JR., and CANDLER CRIM, JR.,
Appellants,

v.

CARL E. SANDERS, as Governor of the State of Georgia, and BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

BRIEF FOR THE APPELLEES.

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BRIEF FOR THE APPELLEES.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT.

On April 17, 1962, the Appellants filed their Complaint[1] in the District Court for the Northern District of Georgia seeking injunctive relief[2] against the enforcement

[1] Record, pp. 1-17.

[2] Record, p. 3, par. VI, p. 13, par. XXV, p. 15, prayers (g) and (h).

of the Georgia Congressional Reapportionment Act of 1931[3] and declaratory judgment[4] invalidating the Act on the grounds that it infringed upon rights of the Appellants guaranteed by the Equal Protection,[5] Due Process,[6] and Privileges and Immunities[7] Clauses of the Fourteenth Amendment, and, further that the Act violated Section 2 of Article I of the Federal Constitution requiring that Representatives be chosen by the people.[8] The Complaint prayed, inter alia, that no elections for Representatives be held, except on a state-at-large basis, pending redistricting by the state legislature on an "equitable and representative" basis.[9] By virtue of these allegations, a three-judge court was convened pursuant to 28 U. S. C., Sections 2281 and 2284, to hear and determine the cause.

In argument before the lower court, the Appellants placed chief reliance upon **Baker v. Carr,**[10] whose rationale went no further than to open the doors of the courts for the adjudication of the consistency of state action with the Federal Constitution when no question is involved concerning interference by the federal judiciary with a political branch of government coequal with this Court. On the other hand, the Appellees, in contending no equity in the Complaint, placed chief reliance upon **Colegrove v. Green,**[11]

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[3] Ga. Laws, 1931, p. 46; Ga. Code, Sec. 34-2301.

[4] Record, p. 3, par. VI.

[5] Record, p. 11, par. XVIII, p. 14, prayer (d).

[6] Record, p. 12, par. XX, p. 14, prayer (c).

[7] Record, p. 11, par. XVII, p. 15, prayer (e).

[8] Record, p. 11, par. XVII, p. 11, par. XIX, p. 15, prayer (f).

[9] Record, p. 14, par. XXVII, p. 15, prayer (i).

[10] (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 691.

[11] (1946), 328 U. S. 549, 90 L. ed. 1432, 66 S. Ct. 1198, reh. den., 329 U. S. 825, 91 L. ed. 701, 67 S. Ct. 118, rearg. den., 329 U. S. 828, 91 L. ed. 703, 67 S. Ct. 199.

which denied relief to parties seeking congressional redistricting in Illinois under facts more extreme than those presented in this case.

On June 20, 1962, the lower court rendered final judgment dismissing the Complaint for want of equity. The court in its opinion summarized the national picture on congressional districting in the following terms:[12]

> The problem here is not peculiar to Georgia. For example, Florida has recently substantially changed its congressional districts by reason of the addition of four new congressmen making a total of twelve. The districts there now range in population from a low of 241,250 to a high of 660,345 as compared to the Florida average of 412,630 a variance greatly exceeding the suggested standard.[13] Dade County with a population of 935,047 is divided among two districts, one consisting of a part of Dade County only, and the other consisting of an adjoining county and the balance of Dade County. Duvall, Hillsborough, and Pinellas Counties each constitutes a district under the new plan with populations respectively of 455,411, 397,788, and 374,665, a sharp example of the variance in population per district if counties are to continue as a basis for districts except where the population of a county is so large as to require division.
>
> There are 435 congressional districts in the United States. Twenty-two congressmen will be elected state-

[12] Record, p. 41, 2d par., 206 F. Supp. 280, l. col., 2d par. For a statistical analysis of the national posture of congressional districting, see Appellees' Exhibits Nos. 1, 2, 3, 4, 8 and B (Record, pp. 79, 93, 107, 114, 122, 139).

[13] "It is the position of plaintiffs that the population of each district should be within a range of ten to fifteen percent of the average district population based on a division of the number of districts into the total population of the state." Record, p. 39, last par., 206 F. Supp. 279, r. col., 2d par.

at-large in 1962. Of the remaining 413, the Fifth District of Texas has the largest population, 951,527. The Fifth District of Georgia, here under discussion is next. There are twenty-two districts with populations exceeding 600,000. Eighty districts have populations more than fifteen per cent above the state average, while ninety have populations of more than fifteen per cent below the state district average. Using ten per cent as a variance, or tolerance, one hundred eight districts are above and one hundred twenty-five are below the average, a total of two hundred thirty-three or more than one-half of all congressional districts. These figures in no way reflect on the problem of deprivation of rights of the type here asserted through use of the gerrymander, a problem with which we are not concerned here but one that could well be within the rationale of any decision reached.

The lower court recognized that a constitutionally reapportioned state legislature could well provide the relief sought by the Appellants, by stating that:[14]

> Our view is buttressed by a due regard for the admonition in **Baker v. Carr** that a "judicially manageable standard" be adopted. This dictates that a reasonable time be afforded for the normal state governmental processes, where there is a substantial chance of relief as we believe there is, to run their course.

The court then moved on to an evaluation of the present vitality of **Colegrove** in the light of **Gomillion v. Lightfoot**[15] and **Baker v. Carr**, and reached the following conclusion:[16]

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[14] Record, p. 45, 3d par.; 206 F. Supp. 282, r. col. (7).

[15] (1960), 364 U. S. 339, 5 L. ed. 2d 110, 81 S. Ct. 125.

[16] Record, p. 50, 3d par., 206 F. Supp. 285, r. col., 2d par.

It would be extraordinary indeed for the court to have departed any more than was absolutely necessary from the previous standard of withholding judicial relief in matters of the kind involved in **Baker v. Carr**, and a good reason to preserve the **Colegrove** doctrine while at the same time reversing the body of law as it concerned state action alone was that fairly apportioned state legislatures might well alleviate congressional district disparity. But whatever the reason we think **Colegrove** stands and so long as it does it will be our guide.

We do not deem it to be a precedent for dismissal based on the non-justiciability of a political question involving the Congress as here, but we do deem it to be strong authority for a dismissal for want of equity, when the following factors here involved are considered on balance: a political question involving a coordinate branch of the federal government; a political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict for the state; relief may be forthcoming from a properly apportioned state legislature; and relief may be afforded by the Congress.

On August 7, 1962, the Appellants filed their Notice of Appeal to this Court (R. 55).

On January 14, 1963, the General Assembly of Georgia convened in regular session with its Senate apportioned according to population as required by **Toombs v. Fortson.**[17] During this session, Appellant Wesberry, a State Senator, introduced Senate Bill No. 101 for the redistricting of Georgia's congressional districts, but due to the gravity of the measure coupled with insufficient time for appropriate study, the Bill did not pass at that session.

[17] (D. C.-N. D. Ga.-1962), 205 F. Supp. 248.

but was referred to the Rules Committee of the Senate where it is still pending for further action. Next, Senator Julian Webb introduced Senate Resolution No. 56, for the creation of a joint Senate-House committee to study congressional redistricting, which was passed by the Senate, but was reported unfavorably in the House. However, this did not end "all attempts at reapportionment at that session of the General Assembly" as stated by the Appellants in their Brief (p. 7, last par.), because Senator Webb then introduced Senate Resolution No. 129 for the authorization of an interim Senate committee to study congressional redistricting and to report its recommendations and studies to the 1964 regular session of the General Assembly. This Resolution was adopted on March 15, 1963,[18] the day the General Assembly adjourned sine die.

On June 10, 1963, this Court issued its order noting probable jurisdiction in this case (R. 56).

In July, 1963, the Joint Congressional Redistricting Study Committee was created by the President of the Senate appointing ten Senators, one from each congressional district, and the Speaker of the House appointing ten Representatives, one from each congressional district.[19] Senator Julian Webb was made Chairman of this Committee. It is a matter of common knowledge that the Committee is in good faith pursuing its task of studying congressional redistricting for the purpose of recommending to the 1964 regular session of the General Assembly a fair and equitable plan for reducing the population variations among the congressional districts.

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[18] A certified copy of Senate Resolution No. 129 has been lodged with the Clerk of this Court.

[19] This Committee was created pursuant to Senate Resolution No. 78 and House Resolution No. 274, both adopted March 15, 1963, certified copies of which have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT.

I.

The judgment of the lower court should be affirmed for properly dismissing the complaint for a want of equity.

Affirmance may be rested upon the "political question" doctrine epitomized by **Colegrove v. Green**, the only case directly in point, or upon the abstention doctrine because of the likelihood that state legislative action will afford the relief sought by the Appellants.

A. The "Political Question" Doctrine.

Article I, Section 4, Clause 1, of the Federal Constitution provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators." In commenting upon this Clause in **The Federalist** (No. 59, 4th par.), Hamilton stated that it was intended to vest, "primarily" in the state legislatures and "ultimately" in the Congress, "a discretionary power" over congressional elections. This Court has long recognized that the power of the Congress under this Clause is paramount. **Smiley v. Holm**, 285 U. S. 355, 366.

Article I, Section 5, Clause 1, of the Federal Constitution provides in part that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ." (Emphasis supplied). By virtue of this Clause, each House of the Congress, acting in a judicial capacity, is the sole and exclusive judge of the elections, returns and qualifications of its members, and no other judicial bodies, including courts, have jurisdic-

tion of those matters. **Barry v. United States ex rel. Cunningham**, 279 U. S. 597, 613, 619.

In view of these authorities, it is manifest that the Congress has plenary power over the election of its membership, including the power to redistrict a state which failed to reapportion in conformity with the latest census or to intervene to correct specific inequalities in a state's districting plan.

Georgia's present congressional districting statute was enacted on August 25, 1931. The Federal Act of November 15, 1941 [55 Stat. 762, 2 U. S. C., Sec. 2a (c)], concerning the reapportionment of the House of Representatives following each decennial census, lists the five varying conditions that may confront a state having congressional districts following a national reapportionment. Under four of these conditions the Act requires that, until redistricting, all or certain of the Representatives of the people of a state shall be elected "from the districts then prescribed by the law of such State". Consequently, the 1941 Act constitutes a congressional confirmation and ratification of state districting acts, including Georgia's 1931 act, in existence at the time of the reapportionment based on the 1940 Census and, also, because of the 1941 Act's continuing effect, those in existence at the time of the reapportionments based on the 1950 and 1960 Censuses. Furthermore, it is self-evident that such is the intention of the Congress because it has long shown an affinity for districting whose present posture is mirrored by the House of Representatives.

With this constitutional and statutory background in mind, we turn now to the consideration of the rationale of **Colegrove v. Green**.

In **Colegrove**, the petitioners challenged the constitutionality of an Illinois statute establishing congressional

districts having population disparities far in excess of those present in this case. Justice Frankfurter announced the judgment of the Court in an opinion, concurred in by Justices Reed and Burton, stating that dismissal of the action was required both by **Wood v. Broom**, 287 U. S. 1, holding that there is no federal requirement that congressional districts shall contain as nearly as practicable an equal number of inhabitants, and because the complaint suffered from a want of equity. The opinion emphasized that the relief sought by the petitioners was beyond the competence of this Court to grant, and "that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility," 328 U. S. 554, and that the remedy for any failure in this area lies with the Congress and ultimately with the people.

Justice Rutledge concurred in the judgment because he believed the Court should exercise its discretion to dismiss for a want of equity. Justices Black, Douglas and Murphy joined in a dissent predicated upon the assumption that there was no likelihood that Illinois would afford relief to the petitioners. As we will see later, such an assumption is unwarranted in this case because of the probability that the reconstituted Georgia legislature will afford the relief sought by the Appellants.

The **Colegrove** doctrine has in effect been reaffirmed by this Court through the citation of **Colegrove** as authority in the following cases which avoided intervention in political matters: **Radford v. Gary**, 352 U. S. 991; **Kidd v. McCanless**, 352 U. S. 920; **South v. Peters**, 339 U. S. 276; and **MacDougall v. Green**, 335 U. S. 281.

In **Gomillion v. Lightfoot**, 364 U. S. 339, decided on November 14, 1960, this Court invalidated a state statute re-

defining the boundaries of the City of Tuskegee on the ground of unconstitutional racial discrimination. In its opinion, this Court carefully distinguished between **Colegrove** and **Gomillion** thereby demonstrating clearly the intention to preserve **Colegrove**.

In **Baker v. Carr**, 369 U. S. 186, the apparent inspiration for this litigation and the case most heavily relied upon by the Appellants, this Court went no further than to open the doors of the courts for the adjudication of the consistency of state action with the Federal Constitution when no question is involved concerning interference by the federal judiciary with a political branch of government coequal with this Court. In its opinion, the Court elaborately distinguished between the "political question" cases and those appropriate for adjudication, thereby clearly maintaining the vitality of **Colegrove** within the political sphere. 369 U. S. 210, 226.

The "political question" doctrine is characterized by the interrelationships of the federal courts to the other two branches of the Federal Government, and not the relationship of such courts to the States. The delicate questions involved in these separation of powers contexts were not present in **Baker**, which only involved the federal courts and a state and the well settled criteria developed under the Equal Protection Clause.

In **Wood, Colegrove** and **Baker**, this Court has clearly announced its judgment that claims of the nature here presented are not appropriate for adjudication.

B. The Abstention Doctrine.

The impact of **Baker v. Carr** has created a dramatic transformation in the political life of Georgia.

On April 28, 1962, a three-judge district court held in **Sanders v. Gray**, 203 F. Supp. 158, that Georgia's county-

unit method of tabulating the vote cast in party primaries for the nomination of candidates for the Governorship and other statewide offices was unconstitutional by virtue of the severe dilution of the urban vote. Consequently, a candidate was nominated for the office of Governor in a primary where all votes were tabulated equally, and, thereafter, the candidate was elected Governor by the people of Georgia in the General Election held on November 6, 1962. It is a matter of common knowledge in Georgia that the Governor exercises great influence upon the activity of the General Assembly of Georgia.

On May 25, 1962, a three-judge district court held in **Toombs v. Fortson**, 205 F. Supp. 248, that the General Assembly of Georgia, composed of a Senate and House of Representatives, was unconstitutionally constituted in that neither House thereof was apportioned according to population. The court further held that the General Assembly must be reconstituted so that at least one House thereof will have been reapportioned according to population prior to the convening of the General Assembly in January, 1963. In accordance with this judgment, the General Assembly convened in extraordinary session and on October 5, 1962, reapportioned the membership of the Senate entirely on a population basis. The membership of this reconstituted Senate was elected at the General Election held on November 6, 1962. The General Assembly convenes in regular session on the second Monday in January of each year.

It is interesting to note that Appellant Wesberry was elected as a member of the reconstituted Senate and that he campaigned on a promise to seek congressional redistricting. He has not previously been elected to membership in the General Assembly.

The membership of the House of Representatives of the General Assembly is composed of 205 Representatives, 84

of whom represent the 38 most populous counties. While the House is apportioned largely according to geography, it is nevertheless clear that the urban areas possess a powerful voice in the House.

In July, 1963, the Joint Congressional Redistricting Study Committee of the General Assembly was created by the President of the Senate appointing ten Senators, one from each congressional district, and the Speaker of the House appointing ten Representatives, one from each congressional district. It is a matter of common knowledge that the Committee is in good faith pursuing its task of studying congressional redistricting for the purpose of recommending to the 1964 regular session of the General Assembly a fair and equitable plan for reducing the population variations among the congressional districts. Furthermore, the Governor has announced publicly that he will support any fair and equitable redistricting plan.

These factors compellingly illustrate the likelihood, recognized by the lower court, that the relief sought by Appellants will be afforded by the reconstituted General Assembly. This likelihood is further intensified by the work of the Joint Congressional Redistricting Study Committee. It may reasonably anticipate the cooperation of the Governor, the Senate and a substantial representation in the House, in securing fair and equitable congressional redistricting.

These circumstances call for the application of the doctrine of equitable abstention. **Great Lakes Dredge & Dock Company v. Huffman**, 319 U. S. 293, 297.

The determination which the Appellants would have this Court make lies in an extremely sensitive area involving the relationship of the powers of the National Government to those of the States. Here, of all places, the federal courts should act cautiously and with great

circumspection and should avoid any action where relief may be furnished by the State. This philosophy of comity governing federal-state relations has been applied by this Court in myriads of contexts.

The cases in which the abstention doctrine has been applied reflect a sound and salutary policy derived from our federalism for the purpose of maintaining a balanced and harmonious relationship between federal and state authority. The considerations that prevailed in the abstention cases for avoiding the hazards of serious disruption by federal courts of state government or needless friction between federal and state authority are all the more appropriate in this case where there is a strong likelihood that the issues will be resolved by state legislative action. Under such circumstances, the lower court did not abuse its discretion in dismissing the Complaint.

C. Conclusion.

Prior to **Baker v. Carr**, the voice of the majority in state government had become largely impaired by virtue of the massive and continuing population shift from rural to urban areas being inadequately reflected in the state legislatures.

Baker v. Carr promises judicial relief for the restoration of the majority to its rightful place in the state legislatures. In **Gray v. Sanders**, 372 U. S. 368, this Court affirmed the invalidation of the Georgia county unit system which had subdued the majority influence in the politically powerful Democratic primary for the nomination of state officers; and the decision of the district court in **Toombs v. Fortson** resulted in the reapportionment of Georgia's Senate according to population. The restoration of these democratic processes has placed Georgia's political destiny in the hands of the majority. Nevertheless, the appellants ignore the conventional remedy and

seek relief from this Court, which if granted, would thrust it into an unseemly conflict with the Congress.

Some enthusiasts for court ordered congressional redistricting, including the appellants, urge the creation of districts which do not vary below 85 percent or above 115 percent of the state population norm. Appellees' Exhibit No. 2 (R. 187-200) reveals that only nine states satisfy this criterion, while the remaining thirty-three states, having congressional districts, fail to qualify.

The Appellees' Exhibits (R. 79-139) and the findings of the lower court (206 F. Supp. 280) clearly illustrate that the form of congressional districting complained of in Georgia is not exotic, but epitomizes a national practice. Furthermore, the figures in these Exhibits do not tell the whole story because they do not show the gerrymander, a common method of districting in many states. This big picture is significant because any direct change by the Court in this area would trigger the rapid institution of widespread redistricting litigation which would place the very existence of the present membership of the National House of Representatives in jeopardy.

However, in **Baker v. Carr**, this Court has set in motion a great engine designed to give the urban areas of the Nation a far greater influence in their state legislatures, an influence which obviously will result in the reshaping of congressional districts according to population. Through this reaction the Appellants will achieve their ends. But, here they seek to catapult this Court into an area constitutionally insulated against judicial interference and involving the most sensitive and delegate relationships with the Congress. In recognition of this, the Court has wisely preserved **Colegrove** and is properly leaving congressional redistricting to reapportioned state legislatures.

These matters involve the internal functioning of a coordinate department, and regard for the separation of

powers, if nothing else, should lead this Court to respect the internal autonomy of the Congress. The traditional deference of this Court for the Congress and the well established principles of equity demand the affirmance of the judgment of the lower court under the circumstances of this case.

II.

This appeal should be dismissed on the ground that the matters in controversy have become moot. In any event, this appeal should be dismissed on the ground that the relief sought as to the congressional election to be held on November 3, 1964, is premature because of the likelihood that the State will afford interim relief.

A. Mootness.

The immediate object of the Complaint in this case was to require congressional redistricting prior to the holding of the General Election on November 6, 1962, or, in the alternative, to require the election of Representatives on a state-at-large basis in the General Election. The Election has now been held and the Representatives of the people of Georgia have been elected for the succeeding two years and, therefore, the immediate controversy between the parties has become moot. There are no acts to restrain at the present time and the other relief sought by the Appellants would have no immediate effect because Georgia's congressional representation has been fixed for the 1963-64 term.

Nevertheless, the Appellants attempt to maintain an active controversy by seeking injunctive and declaratory relief aimed at the General Election to be held on November 3, 1964, and subsequent elections. However, the seeking of this additional relief does not rescue the appeal from its newly acquired theoretical status because the

appeal now only presents an abstract question divorced from any presently existing right or actual controversy. This mootness is further intensified by the probability that the state legislature will afford the relief sought, and the possibility that the Appellants may be ineligible to vote in subsequent general elections through a change in residence or otherwise. What the Appellants really seek at this time is an advisory opinion which is not susceptible of judicial determination.

B. Prematurity as to the 1964 Congressional Election.

In **Remmey v. Smith,** 102 F. Supp. 708, the plaintiffs sought to have a state apportionment act declared unconstitutional and to compel the state legislature to reapportion itself. The three-judge district court held that the suit was premature, on the possibility that the state legislature would afford the relief sought, and dismissed for want of equity.

Upon appeal, this Court entered a *per curiam* opinion stating in part that "The motion to dismiss is granted and the appeal is dismissed for the want of a substantial Federal question." **Remmey v. Smith,** 342 U. S. 916.

The dismissal granted by this Court in **Remmey** is even more appropriate in this case because it involves congressional redistricting in contrast with state legislative reapportionment and, furthermore, because there is a stronger likelihood in this case that the state legislature will afford the relief sought by the Appellants. Hence, this appeal should be dismissed on the ground that the relief sought by the Appellants as to the congressional election to be held on November 3, 1964, is premature.

ARGUMENT.

1.

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED FOR PROPERLY DISMISSING THE COMPLAINT FOR WANT OF EQUITY.

Affirmance may be rested upon the "political question" doctrine epitomized by **Colegrove v. Green**, the only case directly in point, or upon the abstention doctrine because of the likelihood that state legislative action will afford the relief sought by the Appellants.

A. The "Political Question" Doctrine.

1. Congressional Confirmation of Georgia's Congressional Districts.

Article I, Section 4, Clause 1, of the Federal Constitution provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." In commenting upon this Clause in **The Federalist** (No. 59, 4th par.), Hamilton stated that it was intended to vest, "primarily" in the state legislatures and "ultimately" in the Congress, "a discretionary power" over congressional elections.

This Court has long recognized that the power of the Congress under this Clause is paramount.[20] In **Smiley v. Holm**,[21] this Court in construing such Clause held that:

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[20] *Ex Parte Siebold* (1880), 100 U. S. 371, 384, 1st par., 25 L. ed. 717, 721, r. col., last par. See also: *Ex Parte Coy* (1888), 127 U. S. 731, 752, last par., 32 L. ed. 274, 278, l. col., last par., 8 S. Ct. 1263.

[21] (1932), 285 U. S. 355, 76 L. ed. 795, 52 S. Ct. 397.

It[22] cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

In 1941, this Court held that this Clause authorized the Congress to regulate primary as well as general elections "where the primary is by law made an integral part of the election machinery."[23]

Article I, Section 5, Clause 1, of the Federal Constitution provides in part that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ." (Emphasis supplied.) By virtue of this Clause, each House of the Congress, acting in a judicial capacity, is the sole and exclusive judge of the elections, returns and qualifications of its members, and no other judicial bodies, including courts, have jurisdiction of those matters.[24]

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[22] Id., 285 U. S. 366, 2d par., 76 L. ed. 800, 1. col., last par.

[23] *United States v. Classic* (1941), 313 U. S. 299, 318, last par., 85 L. ed. 1368, 1379, r. col., 1st par., 61 S. Ct. 1031, reh. den., 314 U. S. 707, 86 L. ed. 565, 62 S. Ct. 51. See also: *Smith v. Allwright* (1944), 321 U. S. 649, 88 L. ed. 987, 64 S. Ct. 757, reh. den., 322 U. S. 769, 88 L. ed. 1594, 64 S. Ct. 1052.

[24] *United States v. Norris* (1937), 300 U. S. 564, 573, 2d par., 81 L. ed. 808, 812, r. col., last par., 57 S. Ct. 535, 538; *Barry v. United States ex rel. Cunningham* (1929), 279 U. S. 597, 613, last par., 619, 1st par., 73 L. ed. 867, 871, r. col., last par., 874, l. col., last par., 49 S. Ct. 452; *Saunders v. Wilkins* (C. C. A.-4th-1945), 152 F. 2d 235, 238 (3), cert. den., 328 U. S. 870, 90 L. ed. 1640.

In **Keogh v. Horner,**[25] the petitioner sought a writ of prohibition against the Governor of Illinois prohibiting the issuance of certificates of election to those who were ostensibly elected as members of the Congress at the preceding general election, on the ground of a great disparity of population among the various congressional districts. The court, in denying the relief sought, held that:

> The[26] statute, by virtue of which the Governor acts, is as follows (Smith-Hurd Ann. St. Ill. c. 46, § 80, paragraph 82, chapter 46, Elections, Cahill's Rev. St. Illinois 1933): "The Secretary of State, Auditor, Treasurer, and Attorney General, or any two of them in the presence of the Governor shall proceed within twenty days after the election, and sooner if all the returns are received, to canvass the votes given for United States Senators and Representatives to Congress, * * * and the persons having the highest number of votes for the respective offices, shall be declared duly elected; * * * and to each person duly elected, the Governor shall give a certificate of election or commission, as the case may require, and shall cause proclamation to be made of the result of the canvass. * * *"
>
> It would seem to me the Governor has no discretion except to issue the certificate of election or commission to those entitled thereto as is provided in the foregoing section. To hold that the Governor acts in a judicial capacity would do violence, not only to the plain language of the statute just quoted, but

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66 S. Ct. 1362, reh. den., 329 U. S. 825, 91 L. ed. 701, 67 S. Ct. 119; *Scrilla v. Elizalde* (C. A.-D. C.-1940), 112 F. 2d 29, 37 (6). For state court cases on this point, see the Annotation at 105 A. L. R. 205-209.

[25] (D. C.-S. D. Ill.-1934), 8 F. Supp. 933.

[26] Id., p. 934, r. col., 3d par.

would confer upon him the right to conduct and settle contests concerning members of Congress, when that power is expressly conferred upon the respective Houses of Congress by the Constitution of the United States. If the Governor, acting judicially, can determine those elected as members of Congress are to be denied a certificate of election on account of the character of the districts from which they were elected, or because of the failure of the General Assembly to redistrict the state, it would be just as reasonable to conclude that he has the authority and duty to determine any other question concerning the legality of their election, such as the qualifications provided by the Constitution, violation of the Federal Corrupt Practices Act, or any of the other questions which are so often raised in the House of Representatives in election contests. Such a construction of course, would be ridiculous. If the Governor refused or was prohibited from issuing such certificates of election and the situation was presented to the House of Representatives, I do not doubt but what the House would have the right to seat the members elected without any certificate just as it could refuse to seat the members with a certificate, if it chose so to do. In other words, the power of the respective Houses of Congress with reference to the qualifications and legality of the election of its members is supreme. The many volumes of election contest cases in which every conceivable question has been raised with reference to the right of persons to sit as members of Congress, together with the fact that there are no court decisions to be found, controlling such matters, bear mute but forcible evidence that this court has no authority to be the judge of the manner in which such members were elected, or to interfere with the Governor in furnishing them a

certificate or commission as to what the canvass shows with reference to their election.

The court has no jurisdiction to issue the writ prayed for, and the petition is herewith dismissed.

In view of these authorities, it is manifest that the Congress has plenary power over the election of its membership, including the power to redistrict a state which failed to reapportion in conformity with the latest census or to intervene to correct specific inequalities in a state's districting plan.

Georgia's present congressional districting statute was enacted on August 25, 1931.[27] The Federal Act of November 15, 1941 [55 Stat. 762, 2 U. S. C., Sec. 2a (c)], concerning the reapportionment of the House of Representatives following each decennial census, provides, in part, that:

> (c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives, but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the dis-

[27] Ga. Code, Sec. 34-2301; Ga. Laws, 1931, p. 46. This statute resulted from the reduction of Georgia's representation in the House of Representatives from twelve to ten members.

tricts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives, but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

The 1941 Act lists the five varying conditions that may confront a state having congressional districts following a national reapportionment of the House of Representatives. Under four of these conditions the Act requires that until redistricting all or certain of the Representatives of the people of a state shall be elected "from the districts then prescribed by the law of such State." Consequently, the 1941 Act constitutes a congressional confirmation and ratification of state districting acts, including Georgia's 1931 act, in existence at the time of the reapportionment based on the 1940 Census, and also because of the 1941 Act's continuing effect, those in existence at the time of the reapportionments based on the 1950 and 1960 Censuses.[28] Furthermore, it is self-evident that such is the intention of the Congress because it has long shown an affinity for districting whose present posture is mirrored by the House of Representatives.

With this constitutional and statutory background in mind, we turn now to the consideration of the rationale of **Colegrove v. Green.**

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[28] Compare *Ohio ex rel. Davis v. Hildebrant* (1916), 241 U. S. 565, 568, 2d par., 60 L. ed. 1172, 1176, r. col., last par., 36 S. Ct. 708.

2. The **Colegrove** Rationale.

In **Wood v. Broom**[29] a voter attacked the 1932 Mississippi Congressional Redistricting Statute as violating Article I, Section 4, and the Fourteenth Amendment, of the Federal Constitution and the 1911 Federal Congressional Reapportionment Act.[30] This Court ruled that no federal requirement, directing that congressional districts be composed of contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants, existed where not embodied in the 1929 Federal Congressional Reapportionment Act, and that the provision to that effect in the preceding 1911 Reapportionment Act had reference solely to the districts in which the Representatives were to be elected under the apportionment made by that Act. This Court reversed and remanded the case to the district court with directions to dismiss the complaint. Justices Brandeis, Stone, Roberts and Cardozo concurred in the result, but were of the opinion that the decree should be reversed and the bill dismissed for want of equity, without passing upon the question as to the applicability of the 1911 Reapportionment Act.[31]

The evidence is abundant that **Wood** coincided with congressional intent. The Congress has consistently failed to re-enact the districting requirements of the 1911 Federal Congressional Reapportionment Act or similar ones, irrespective of persistent efforts on the part of some members of the Congress to restore such requirements.[32]

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[29] (1932), 287 U. S. 1, 77 L. ed. 131, 53 S. Ct. 1.

[30] Id., 287 U. S. 4, last par., 77 L. ed. 133, 3d col., 1st par.

[31] Id., 287 U. S. 8, last par., 77 L. ed. 135, 1st col., last par.

[32] Notable among these efforts, are those of Representative Emanuel Celler of New York as a member of the House Judiciary Committee.

In **Colegrove v. Green,**[33] this Court was confronted with an action instituted by Illinois voters residing in congressional districts whose populations ranged from 612,000 to 914,000. Twenty other congressional districts had populations that ranged from 112,116 to 385,207 and in seven of these districts the population was below 200,000.[34] The appellants claimed that since they resided in the heavily populated districts their vote was much less effective than the vote of those residing in a district which under the 1901 State Apportionment Act was also allowed to choose one congressman, though its population was sometimes only one-ninth that of the heavily populated districts.[35] The appellants contended that this reduction of the effectiveness of their vote violated Article I and the Fourteenth Amendment of the Federal Constitution.[36]

Justice Frankfurter announced the judgment of the Court in an opinion concurred in by Justices Reed and Burton wherein they opined that dismissal of the complaint was required both by **Wood v. Broom,** supra, holding that there is no federal requirement that congressional districts shall contain as nearly as practicable an equal number of inhabitants and because the complaint suffered from a want of equity.[37]

In commenting on **Wood v. Broom,** Justice Frankfurter stated that:[38]

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[33] (1946), 328 U. S. 549, 90 L. ed. 1432, 66 S. Ct. 1198, reh. den. 329 U. S. 825, 91 L. ed. 701, 67 S. Ct. 118, rearg. den. 329 U. S. 828, 91 L. ed. 703, 67 S. Ct. 199.

[34] Id., 328 U. S. 566, last par., 90 L. ed. 1443, l. col., last par.

[35] Id., 328 U. S. 567, last par., 90 L. ed. 1444, l. col. We should note here, that in Georgia the most extreme ratio is approximately three to one. Record, p. 39, 2d par., 206 F. Supp. 279, l. col., 4th par.

[36] Id., 328 U. S. 567, last par., 90 L. ed. 1443, r. col., last par.

[37] Id., 328 U. S. 551, 2d par., 90 L. ed. 1433, l. col., last par.

[38] Id.

Nothing has now been adduced to lead us to overrule what this Court found to be the requirements under the Act of 1929, the more so since seven Congressional elections have been held under the Act of 1929 as construed by this Court. No manifestation has been shown by Congress even to question the correctness of that which seemed compelling to this Court in enforcing the will of Congress in **Wood v. Broom.**

But we also agree with the four justices (Brandeis, Stone, Roberts, and Cardozo, JJ.) who were of opinion that the bill in **Wood v. Broom**, supra, should be "dismissed for want of equity."

Justice Frankfurter further stated that:[39]

We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.

Of[40] course no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives

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[39] Id., 328 U. S. 552, 2d par., 90 L. ed. 1433, r. col., last par.

[40] Id., 328 U. S. 553, 1st par., 90 L. ed. 1434, l. col., last par.

on a state-wide ticket. The last stage may be worse than the first. The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting. This requirement, in the language of Chancellor Kent, "was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly over-powered by the combined action of the numerical majority, without any voice whatever in the national councils." 1 Kent, Commentaries, 12th ed., 1873, 230-231, note (c). Assuming acquiescence on the part of the authorities of Illinois in the selection of its Representatives by a mode that defies the direction of Congress for selection by districts, the House of Representatives may not acquiesce. In the exercise of its power to judge the qualifications of its own members, the House may reject a delegation of Representatives-at-large. . . .

The[41] petitioners urge with great zeal that the conditions of which they complain are grave evils and offend public morality. The Constitution of the United States gives ample power to provide against these evils. But due regard for the Constitution as a viable system precludes judicial correction. Authority for dealing with such problems resides elsewhere. Article 1, § 4 of the Constitution provides that "The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, . . ." The short of it is that the Constitution has conferred

[41] Id., 328 U. S. 554, 2d par., 90 L. ed. 1434, r. col., last par.

upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress. An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate.

The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests. The Constitution enjoins upon Congress the duty of apportioning Representatives "among the several States . . . according to their respective Numbers, . . ." Article 1, § 2. Yet, Congress has at times been heedless of this command and not apportioned according to the requirements of the Census. It never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion. "What might not be done directly by mandamus, could not be attained indirectly by injunction." . . . Throughout our history, whatever may have been the controlling Apportionment Act, the most glaring disparities have prevailed as to the contours and the population of districts. . . .

To[42] sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness

[42] Id., 328 U. S. 556, 2d par., 90 L. ed. 1436, 1. col., 2d par.

> in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

Justice Rutledge concurred in the judgment because he believed the Court should exercise its discretion to dismiss for want of equity, on several grounds: that to grant relief would involve the Court in delicate relations with the Congress and the States; that the date (June 10, 1946) was so late as to make redistricting unlikely before the election; and that the election of Representatives on a state-at-large basis would be undesirable.[43]

Justice Black, dissenting in an opinion joined by Justices Douglas and Murphy, opined that the district court had jurisdiction, that a justiciable question was presented, that the appellants had standing to sue,[44] that the population disparities among the districts violated Article I and the Equal Protection Clause,[45] and that, hence relief should be afforded. The dissent was clearly predicated upon the assumption that there was no likelihood that Illinois would afford relief to the appellants because the state legislature was apportioned in such a manner that the state legislators had an interest in perpetuating the complained of congressional districting, and, furthermore, because a series of suits previously instituted in the state

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[43] Id., 328 U. S. 565, 4th par., 90 L. ed. 1442, 1. col., 4th par.

[44] Id., 328 U. S. 568, 90 L. ed. 1444, 1. col.

[45] Id., 328 U. S. 570, 90 L. ed. 1445, 1. col., 2d par.

courts challenging the validity of such districting had proved ineffective.[46] Such an assumption is unwarranted in this case because of the probability that the reconstituted Georgia legislature will afford the relief sought by the Appellants. This aspect is treated later in this division of the Brief.

As did their counterparts in **Colegrove**, the Appellants in this case seek the election of Representatives on a state-at-large basis pending redistricting by the state legislature according to population. Obviously, statewide electioneering would be calculated to appeal to the compact majority residing in the easily accessible urban areas and hence would result in the neglect of the substantial minority residing in the rural areas. Even the advocates of federal requirements for congressional districting disapprove the election of Representatives on a state-at-large basis. For instance, Representative Celler in a hearing before his House Committee on the Judiciary stated that:[47]

> I have eliminated the idea of drawing district lines here in Washington as impracticable. In view of the requirement of compactness, such elements as economic and social interests of an area, its topography and geography, means of transportation, the desires of the inhabitants as well as of their elected representatives, and finally the political factors should all be considered. Thus I believe State legislature to be far better equipped to determine and evaluate those factors than either the Congress or any national agency it might designate to do so. I look with disfavor upon compelling Representatives to run at large

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[46] Id., 328 U. S. 567, 1st par., 90 L. ed. 1443, r. col., 1st par.

[47] Hearing on June 24, 1959, before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 86th Congress, 1st session, on House Resolutions 73, 575, 8266 and 8473.

as a means of enforcement; in fact, one of the very purposes behind my bill is to eliminate once and for all Congressmen at large.

The **Colegrove** rationale has in effect been reaffirmed by this Court through the citation of **Colegrove** as authority in the following cases which avoided intervention in political matters: **Radford v. Gary** (1957), 352 U. S. 991, 1 L. ed. 2d 540, 77 S. Ct. 559; **Kidd v. McCanless** (1956), 352 U. S. 920, 1 L. ed. 2d 157, 77 S. Ct. 223; **South v. Peters** (1950), 339 U. S. 276, 94 L. ed. 834, 70 S. Ct. 461, and **MacDougall v. Green** (1948), 335 U. S. 281, 93 L. ed. 3, 69 S. Ct. 1.

In **Gomillion v. Lightfoot,**[48] decided on November 14, 1960, the plaintiffs, Negroes, attacked the constitutionality of a state statute redefining the boundaries of the City of Tuskegee. The plaintiffs contended that enforcement of the statute, which altered the shape of the city from a square to a twenty-eight-sided figure and removed from the city all save a few Negro voters, but no white voters, constituted a discrimination against them in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and denied them the right to vote in defiance of the Fifteenth Amendment. This Court, speaking through Justice Frankfurter, held that assuming the truth of plaintiffs' allegations, the statute was invalid because violating the Fifteenth Amendment, which forbids a state from passing any law depriving a citizen of his vote because of his race.

The Court in distinguishing **Colegrove** stated that:[49]

> The respondents find another barrier to the trial of this case in **Colegrove v. Green**, 328 U. S. 549, 90

[48] (1960), 364 U. S. 339, 5 L. ed. 2d 110, 81 S. Ct. 125.

[49] Id., 364 U. S. 346, 1st par., 5 L. ed. 2d 116, 1. col., 2d par.

L. ed. 1432, 66 S. Ct. 1198. In that case the Court passed on an Illinois law governing the arrangement of congressional districts within that State. The complaint rested upon the disparity of population between the different districts which rendered the effectiveness of each individual's vote in some districts far less than in others. This disparity came to pass solely through shifts in population between 1901, when Illinois organized its congressional districts, and 1946, when the complaint was lodged. During this entire period elections were held under the districting scheme devised in 1901. The Court affirmed the dismissal of the complaint on the ground that it presented a subject not meet for adjudication. The decisive facts in this case, which at this stage must be taken as proved, are wholly different from the considerations found controlling in **Colegrove**.

That case involved a complaint of discriminatory apportionment of congressional districts. The appellants in **Colegrove** complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this controversy out of the so-called "political" arena and into the conventional sphere of constitutional litigation."

> . . . While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not **Colegrove v. Green**.

Implicit within this careful distinction between **Colegrove** and **Gomillion** is the obvious desire to preserve **Colegrove**.

We now turn our attention to **Baker v. Carr**,[50] the apparent inspiration for this litigation and the case most heavily relied upon by the Appellants. The complaint in **Baker** alleged that because of population shifts and the failure of the Tennessee legislature to reapportion as required by the State Constitution, the 1901 State Apportionment Act had become obsolete, and denied the plaintiffs equal protection of the laws as guaranteed by the Fourteenth Amendment. In an opinion by Justice Brennan, expressing the views of six members of this Court, it was held that the district court possessed jurisdiction of the subject matter; that a justiciable cause of action was stated upon which the plaintiffs would be entitled to appropriate relief; and that the plaintiffs had standing to challenge the 1901 State Apportionment Act.[51]

This Court in **Baker** elaborately distinguished between the "political question" cases and those appropriate for adjudication, thereby clearly maintaining the vitality of **Colegrove** within the political sphere. The majority opinion defined the contours of the "political question" cases in the following unmistakable terms.[52]

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[50] (1962), 369 U. S. 186, 7 L. ed. 2d 663, 82 S. Ct. 691.

[51] Id., 369 U. S. 197, last par., 7 L. ed. 674, 1. col., last par.

[52] Id., 369 U. S. 210, 2d par., 7 L. ed. 2d 681, r. col., 2d par.

Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness. Since that review is undertaken solely to demonstrate that neither singly nor collectively do these cases support a conclusion that this apportionment case is nonjusticiable, we of course do not explore their implications in other contexts. That review reveals that in the Guaranty Clause cases and in the other "political question" cases, **it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."**

We have said that "in determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." **Coleman v. Miller**, 307 U. S. 433, 454, 455, 83 L. ed. 1385, 1396, 1397, 59 S. Ct. 972, 122 A. L. R. 695. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. **Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise, in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.** . . .

It[53] is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

We[54] come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the

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[53] Id., 369 U. S. 217, 2d par., 7 L. ed. 2d 685, r. col., 2d par.

[54] Id., 369 U. S. 226, 2d par., 7 L. ed. 2d 691, l. col., 2d par.

constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking (Emphasis supplied).

These attributes are synonymous with those present in **Colegrove** and in this case. The "political question" doctrine is characterized by the interrelationships of the federal courts to the other two branches of the Federal Government, and not the relationship of such courts to the States. The delicate questions involved in these separation of powers contexts were not present in **Baker**, which only involved the federal courts and a state and the well settled criteria developed under the Equal Protection Clause.

The Constitution has clearly conferred upon Congress the exclusive authority and responsibility to secure fair representation by the States in the popular House and left to that House the determination of whether states have fulfilled their responsibility. If a state selects its Representatives by a mode that defies the direction of Congress for selection by districts, the House, in the exercise of its power to judge the qualifications of its own members, may reject the delegation of Representatives.

In **Wood**, **Colegrove** and **Baker**, this Court has clearly announced its judgment that claims of the nature here presented are not appropriate for adjudication.

B. The Abstention Doctrine.

1. Georgia's New Political Climate.

The impact of **Baker v. Carr** has created a dramatic transformation in the political life of Georgia.

On April 28, 1962, a three-judge district court[55] held in **Sanders v. Gray**[56] that Georgia's county-unit method of tabulating the vote cast in party primaries for the nomination of candidates for the Governorship and other statewide offices was unconstitutional by virtue of the severe dilution of the urban vote. Consequently, on September 12, 1962, a Democratic candidate was nominated for the office of Governor in a primary where all votes were tabulated equally. This candidate was elected Governor by the people of Georgia in the General Election held on November 6, 1962, and he now holds such office. It is a matter of common knowledge in Georgia that the Governor exercises great influence upon the activity of the General Assembly of Georgia.

On May 25, 1962, a three-judge district court[57] held in **Toombs v. Fortson**[58] that the General Assembly of Georgia, composed of a Senate and House of Representatives, was unconstitutionally constituted in that neither House thereof was apportioned according to population. The court further held that the General Assembly must be reconstituted so that at least one House thereof will have been reapportioned according to population prior to the convening of the General Assembly in January, 1963.[59] The court concluded by stating that:[60]

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[55] Composed of Circuit Judges Tuttle and Bell and District Judge Hooper.

[56] (D. C.-N. D.-1962), 203 F. Supp. 158.

[57] Composed of Circuit Judges Tuttle and Bell and District Judge Morgan, the same three judges composing the lower court in this case.

[58] (D. C.-N. D.-1962), 205 F. Supp. 248.

[59] The General Assembly convenes in regular session on the second Monday in January of each year. Par. III, Sec. IV, Art. III, Ga. Const.; Ga. Code Ann., Sec. 2-1603.

[60] 205 F. Supp. 258, r. col., last par.

> Giving full consideration to all of these factors,[61] and recognizing the right of the plaintiffs to have their constitutional rights vindicated at the earliest practicable moment, while at the same time according every presumption of good faith to, and affording a reasonable opportunity to act to, the responsible State officials and the present General Assembly now that the rights of the parties have been declared, we have concluded that we should enter no injunction at this time. We have concluded that we should postpone any further proceedings in this matter until the State has had a reasonable opportunity to reconstitute the Legislature so as to meet the constitutional standards here laid down prior to the January, 1963, session. If it appears that the Legislature has taken such action as brings the composition of the General Assembly within such constitutional standards, then this Court need take no further action. If, on the other hand, the Legislature does not act, or if its action does not meet constitutional standards, then we will be under a clear duty to take such action as is necessary and feasible to accord plaintiffs their rights.

On September 14, 1962, the Governor of Georgia issued his Proclamation[62] convening the General Assembly in extraordinary session on September 27, 1962, for the purpose *inter alia*, of considering and enacting laws relating to the reapportionment of the Senate within the requirements of

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[61] See 205 F. Supp. 258, 1. col., (7). These factors converged in the determination that it would be feasible for the General Assembly to convene in extraordinary session, after the conclusion of the state primaries in September, 1962 but prior to the holding of the General Election on November 6, 1962, for the purpose of reapportioning itself to conform to the criteria prescribed by the court.

[62] Ga. Laws, Sept.-Oct. 1962, Extra Sess., pp. 3-5. A copy of the Proclamation is set forth in Appendix A, pp. 47-48, to the Appellees' Motion to Affirm or Dismiss With Supporting Brief.

Toombs v. Fortson. This convening of the extraordinary session immediately followed the conclusion of the state primary process in September for the nomination of party candidates for the public offices filled in the General Election held on November 6, 1962.

Upon convening, the General Assembly expeditiously went about the business of considering the reconstitution of the Senate, which culminated on October 5, 1962, in the enactment into law of Act No. 1[63] apportioning the membership of the Senate entirely on a population basis as required by **Toombs v. Fortson.** Thereafter, special senatorial primaries were held for the nomination of party candidates for membership in the reconstituted Senate, and at the General Election held on November 6, 1962, senators were elected by the people to represent the newly defined senatorial districts.

It is interesting to note that Appellant Wesberry was elected as the Senator to represent the 37th Senatorial District, and that it is a matter of common knowledge that during his campaign he promised that "if elected he will promptly introduce a bill to reapportion the 5th Congressional District in a way that will give Fulton County its own congressional seat."[64] He has not previously been elected to membership in the General Assembly.

The membership of the House of Representatives of the General Assembly is apportioned, after each federal census, among Georgia's 159 counties as follows: "To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest

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[63] Ga. Laws, Sept.-Oct. 1962, Extra. Sess., pp. 7-31. A copy of the Act is set forth in Appendix B, pp. 49-75, to the Appellees' Motion to Affirm or Dismiss With Supporting Brief.

[64] *The Atlanta Journal*, Thursday, Oct. 11, 1962, p. 17, 3d col., 2d par.

population, two representatives each; and to the remaining counties, one representative each."[65] Consequently, the House is composed of 205 Representatives, 84 of whom represent the 38 most populous counties. While the House is apportioned largely according to geography, it is nevertheless clear that the urban areas possess a powerful voice in the House.

On January 14, 1963, the General Assembly of Georgia convened in regular session with its Senate apportioned according to population. During this session, Appellant Wesberry introduced Senate Bill No. 101 for the redistricting of Georgia's congressional districts, but due to the gravity of the measure coupled with insufficient time for appropriate study, the Bill did not pass at that session, but was referred to the Rules Committee of the Senate where it is still pending for further action. Next, Senator Julian Webb introduced Senate Resolution No. 56, for the creation of a joint Senate-House committee to study congressional redistricting, which was passed by the Senate, but was reported unfavorably in the House. However, this did not end "all attempts at reapportionment at that session of the General Assembly" as stated by the Appellants in their Brief (p. 7, last par.), because Senator Webb then introduced Senate Resolution No. 129 for the authorization of an interim Senate committee to study congressional redistricting and to report its recommendations and studies to the 1964 regular session of the General Assembly. This Resolution was adopted on March 15, 1963,[66] the day the General Assembly adjourned sine die.

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[65] Sec. III, Art. III, Ga. Const.; Ga. Code Ann., Ch. 2-15. The membership of the House of Representatives elected for the 1963-64 term and to be elected for subsequent terms has been reapportioned on the basis of the 1960 federal census. Ga. Laws, 1961, p. 111; Ga. Code, Sec. 47-101.

[66] A certified copy of Senate Resolution No. 129 has been lodged with the Clerk of this Court.

In July 1963, the Joint Congressional Redistricting Study Committee was created by the President of the Senate appointing ten Senators, one from each congressional district, and the Speaker of the House appointing ten Representatives, one from each congressional district.[67] Senator Julian Webb was made Chairman of this Committee. It is a matter of common knowledge that the Committee is in good faith pursuing its task of studying congressional redistricting for the purpose of recommending to the 1964 regular session of the General Assembly a fair and equitable plan for reducing the population variations among the congressional districts. Furthermore, the Governor has announced publicly that he will support any fair and equitable redistricting plan.[68]

It is interesting to note, that Appellant Wesberry admitted in his statement of September 17, 1963, filed with

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[67] This Committee was created pursuant to Senate Resolution No. 78 and House Resolution No. 274, both adopted March 15, 1963, certified copies of which have been lodged with the Clerk of this Court.

[68] Judicial notice may be taken of matters of common knowledge relating to political affairs and legislative matters. *Hamilton v. Regents of the University of California* (1934), 293 U. S. 245, 259, last par., 79 L. ed. 343, 351, 1. col., 2d par., 55 S. Ct. 197, reh. den., 293 U. S. 633, 79 L. ed. 717, 55 S. Ct. 345; *Meredith v. Fair* (C. A.-5th-1962), 298 F. 2d 696, 701 (1), cert. den., 371 U. S. 828, 9 L. ed. 2d 66, 83 S. Ct. 49; *Malone Freight Lines v. Tutton* (C. A.-5th-1949), 177 F. 2d 901, 903, r. col., 1st par.; *Savannah River Electric Co. v. Federal Power Commission* (C. C. A.-4th-1947), 164 F. 2d 408, 410, 1. col., last par.; *United States v. Warnecke* (C. C. A.-7th-1943), 138 F. 2d 561, 565, 1. col., last par., cert. den., 321 U. S. 771, 88 L. ed. 1066, 64 S. Ct. 529, reh. den., 321 U. S. 803, 88 L. ed. 1089, 64 S. Ct. 635; *Greeson v. Imperial Irr. Dist.* (C. C. A.-9th-1932), 59 F. 2d 529, 531, 1. col., 1st par.; *Bok v. McCaughn* (C. C. A.-3d-1930), 42 F. 2d 616, 618, r. col., 1st par.; *National Maritime Union of America v. Herzog* (D. C.-D. C.-1948), 78 F. Supp. 146, 167 (39), aff'd, 334 U. S. 854, 92 L. ed. 1776, 68 S. Ct. 1529; *Elmore v. Rice* (D. C.-E. D. S. C.-1947), 72 F. Supp. 516, 519 (2), aff'd, 165 F. 2d 387, cert. den., 333 U. S. 875, 92 L. ed. 1151, 68 S. Ct. 905; *United States v. Rossini* (D. C.-E. D. N. Y.-1943), 52 F. Supp. 816, 819 (4); *Town of O'Keene, Okla., ex rel. Burgard v. Klotz* (D. C.-W. D. Okla.-1942), 45 F. Supp. 629, 633 (6).

the Joint Congressional Redistricting Study Committee, that "I made it clear that I did not think that Senate Bill 101 should be passed as introduced, but that it should undoubtedly be drastically changed to meet with the approval of all citizens of Georgia" and that "I believe it includes some good suggestions and I know it includes some bad ones." (Statement, p. 3, 1st par.)[69]

These factors compellingly illustrate the likelihood, recognized by the lower court,[70] that the relief sought by Appellants will be afforded by the reconstituted General Assembly. This likelihood is further intensified by the work of the Joint Congressional Redistricting Study Committee. It may reasonably anticipate the cooperation of the Governor, the Senate, and a substantial representation in the House, in securing fair and equitable congressional redistricting.

2. Federal-State Relations.

The determination which the Appellants would have this Court make lies in an extremely sensitive area involving the relationship of the powers of the National Government to those of the States. Here, of all places, the federal courts should act cautiously and with great circumspection and should avoid any action where relief may be furnished by the State. This philosophy of comity governing federal-state relations has been applied by this Court in myriad of contexts.

In **Great Lakes Dredge & Dock Company v. Huffman**,[71] the petitioners instituted in federal court a declaratory judgment action seeking to have a state law as applied to them and their employees declared unconstitutional. The

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[69] A certified copy of this statement has been lodged with the Clerk of this Court.

[70] Record, p. 45, 3d par., 206 F. Supp. 282, r. col. (7).

[71] (1943), 319 U. S. 293, 87 L. ed. 1407, 63 S. Ct. 1070.

action was dismissed and on appeal to this Court the judgment was affirmed in a unanimous opinion stating in part that:[72]

> This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer. **Matthews v. Rodgers**, 284 U. S. 521, 76 L. ed. 447, 52 S. Ct. 217. This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts, or of the settled rule that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts. **Stratton v. St. Louis Southwestern R. Co.**, 284 U. S. 530, 533, 534, 76 L. ed. 465, 468, 469, 52 S. Ct. 222; **Di Giovanni v. Camden F. Ins. Asso.**, 296 U. S. 64, 69, 80 L. ed. 47, 51, 56 S. Ct. 1. On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as at law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest (**United States ex rel. Greathouse v. Dern**, 289 U. S. 352, 359, 360, 77 L. ed. 1250, 1254, 1255, 53 S. Ct. 614; **Virginian R. Co. v. System Federation**, R. E. D., 300 U. S. 515, 549-553, 81 L. ed. 789, 800, 802, 57 S. Ct. 592), should stay its hand in the public interest when it reasonably appears that private interests will not suffer. See **Pennsylvania v. Williams**, 294 U. S. 176, 185, 79 L. ed.

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[72] Id., 319 U. S. 297, last par., 87 L. ed. 1410, r. col., last par.

841, 847, 53 S. Ct. 380, 96 A. L. R. 1166, and cases cited.

It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.

"The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved." **Matthews v. Rodgers**, supra (284 U. S. 525, 526, 76 L. ed. 451, 452, 52 S. Ct. 217).

The[73] statutory authority to render declaratory judgments permits federal courts by a new form of procedure to exercise the jurisdiction to decide cases or controversies, both at law and in equity, which the Judiciary Acts had already conferred. **Aetna L. Ins. Co. v. Haworth**, 200 U. S. 227, 81 L. ed. 617, 57 S. Ct. 461, 108 A. L. R. 1000. Thus the Federal Declaratory Judgments Act (Act of June 14, 1934, 48 Stat. 955, c.

[73] Id., 319 U. S. 299, last par., 87 L. ed. 1412, 1. col., 2d par. As to this aspect of the opinion, see also: *Public Affairs Press v. Rickover* (1962), 369 U. S. 111, 112, 2d par., 7 L. ed. 2d 606, 82 S. Ct. 582; and *Eccles v. Peoples Bank* (1948), 333 U. S. 426, 431, 2d par., 92 L. ed. 784, 789, 1. col., 2d par., 68 S. Ct. 641, reh. den. (1948), 333 U. S. 877, 92 L. ed. 1153, 68 S. Ct. 900.

512, as amended, 28 U. S. C. A., § 400, 8 F. C. A., title 28, § 400), provides in § 1 that a declaration of rights may be awarded although no further relief be asked and in § 2 that "further relief based on a declaratory judgment or decree may be granted whenever necessary or proper."

The jurisdiction of the district court in the present suit, praying an adjudication of rights in anticipation of their threatened infringement, is analogous to the equity jurisdiction in suits quia timet or for a decree quieting title. See **Nashville, C. & St. L. R. Co. v. Wallace**, 288 U. S. 249, 263, 77 L. ed. 730, 735, 53 S. Ct. 345, 87 A. L. R. 1191. Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds. The Declaratory Judgments Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles. The Senate committee report on the bill pointed out that this Court could, in the exercise of its equity power, make rules governing the declaratory judgment procedure. S. Rep. No. 1005, 73rd Cong., 2d Sess., p. 6. And the House report declared that "large discretion is conferred upon the courts as to whether or not they will administer justice by this procedure." H. R. Rep. No. 1264, 73rd Cong., 2d Sess., p. 2; and see **Brillhart v. Excess Ins. Co.**, 316 U. S. 491, 494, 86 L. ed. 1620, 1624, 62 S. Ct. 1173; **Borchard, Declaratory Judgments**, 2d ed., p. 312.

Martin v. Creasy[74] involved an action instituted in federal court by owners of property abutting a section of

[74] (1959), 360 U. S. 219, 3 L. ed. 2d 1186, 79 S. Ct. 1034.

highway which, under authority of a Pennsylvania statute, was to be designated as a "limited access highway," to which owners of abutting property had no right of ingress or egress except as may be provided by the authorities responsible for the highway. Claiming that the enforcement of the statute would deprive them of their property without due process of law, since the statute did not provide compensation for loss of access to the highway, the plaintiffs asked for injunctive relief and for a judgment declaring the statute unconstitutional. In equitable proceedings in the state courts it was found that the state statute provided a complete procedure to guard and protect the plaintiffs' constitutional rights at all times. Nevertheless, the district court granted the plaintiffs relief, believing that they might be irreparably harmed during the period required to determine their rights in the state courts.

On appeal, this Court reversed holding in part that:[75]

> The circumstances which should impel a federal court to abstain from blocking the exercise by state officials of their appropriate functions are present here in a marked degree. The considerations which support the wisdom of such abstention have been so thoroughly and repeatedly discussed by this Court as to require little elaboration. **Railroad Com. v. Pullman Co.**, 312 U. S. 496, 85 L. ed. 971, 61 S. Ct. 643; **Chicago v. Fieldcrest Dairies**, 316 U. S. 168, 86 L. ed. 1355, 62 S. Ct. 986; **Spector Motor Service, Inc. v. McLaughlin**, 323 U. S. 101, 89 L. ed. 101, 65 S. Ct. 152; **A. F. of L. v. Watson**, 327 U. S. 582, 90 L. ed. 873, 66 S. Ct. 761; **Government Employees v. Windsor**, 353 U. S. 364, 1 L. ed. 2d 894, 77 S. Ct. 838. See also: **Alabama Public Service Com. v. Southern R. Co.**, 341 U. S. 341, 95 L. ed. 1002, 71 S. Ct. 762. Reflected

[75] Id., 360 U. S. 224, 2d par., 3 L. ed. 2d 1189, r. col., last par.

among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions. All those factors are present here.

For other cases applying the doctrine of equitable abstention, see: **Harrison v. NAACP** (1959), 360 U. S. 167, 176, 2d par., 3 L. ed. 2d 1152, 1158, l. col., 2d par., 79 S. Ct. 1025; **Louisiana Power & Light Co. v. City of Thibodaux** (1959), 360 U. S. 25, 27, 1st par., 3 L. ed. 2d 1058, 1061, l. col., last par., 79 S. Ct. 1070, reh. den. (1959), 360 U. S. 940, 3 L. ed. 2d 1552, 79 S. Ct. 1442; **City of Meridian v. Southern Bell Tel. & Tel. Co.** (1959), 358 U. S. 639, 640, last par., 3 L. ed. 2d 562, 563, r. col., 2d par., 79 S. Ct. 455; **Albertson v. Millard** (1953), 345 U. S. 242, 245, 2d par., 97 L. ed. 983, 985, r. col., 3d par., 73 S. Ct. 600; **Burford v. Sun Oil Co.** (1943), 319 U. S. 315, 317, last par., 87 L. ed. 1424, 1426, l. col., 2d par., 63 S. Ct. 1098, reh. den. (1943), 320 U. S. 214, 87 L. ed. 1851, 63 S. Ct. 1442; **Beal v. Missouri Pacific Railroad Corp.** (1941), 312 U. S. 45, 50, 1st par., 85 L. ed. 577, 580, l. col., 1st par., 61 S. Ct. 418; and **Giovanni v. Camden Fire Insurance Assn.** (1935), 296 U. S. 64, 73, last par., 80 L. ed. 47, 53, r. col., last par., 56 S. Ct. 1. See also Justice Clark's concurring opinion in **Baker v. Carr**, 369 U. S. 258, last par.

These cases reflect a sound and salutary policy derived from our federalism for the purpose of maintaining a balanced and harmonious relationship between federal and state authority. The considerations that prevailed in these cases for avoiding the hazards of serious disruption by federal courts of state government or needless friction between federal and state authority are all the more appropriate in this case where there is a strong likelihood that the issues will be resolved by state legislative action.

Under such circumstances, the lower court did not abuse its discretion in dismissing the Complaint.[76]

C. Conclusion.

Prior to **Baker v. Carr**, the voice of the majority in state government had become largely impaired by virtue of the massive and continuing population shift from rural to urban areas being inadequately reflected in the state legislatures.

Baker v. Carr promises judicial relief for the restoration of the majority to its rightful place in the state legislatures. In **Gray v. Sanders**,[77] this Court affirmed the invalidation of the Georgia County unit system which had subdued the majority influence in the politically powerful Democratic primary for the nomination of state officers; and the decision of the district court in **Toombs v. Fortson** resulted in the reapportionment of Georgia's Senate according to population. The restoration of these democratic processes has placed Georgia's political destiny in the hands of the majority, and has robbed the following allegations of the Appellants' Complaint (R.

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[76] *Martin v. Creasy* (1959), 360 U. S. 219, 225, 3 L. ed. 2d 1186, 1190, r. col., 79 S. Ct. 1034; *Alabama Pub. Ser. Com. v. Southern Railway Co.* (1951), 341 U. S. 341, 95 L. ed. 1002, 71 S. Ct. 762, "The motions of the appellee that the mandates of these cases provide for retention by the District Court of jurisdiction pending further proceedings are denied" (1951), 341 U. S. 946, 95 L. ed. 1370, 71 S. Ct. 1011; *Burford v. Sun Oil Co.* (1943), 319 U. S. 315, 334, 2d par., 87 L. ed. 1424, 1435, l. col., 2d par., 63 S. Ct. 1098, reh. den. (1943), 320 U. S. 214, 87 L. ed. 1851, 63 S. Ct. 1442; *Hastings v. Shelby Oil & Gas Co.* (1943), 319 U. S. 348, 87 L. ed. 1443, 63 S. Ct. 1114, reh. den. (1943), 320 U. S. 214, 87 L. ed. 1851, 63 S. Ct. 1442; *Great Lakes Dredge & Dock Co. v. Huffman* (1943), 319 U. S. 293, 301, last par., 87 L. ed. 1407, 1413, l. col., 2d par., 63 S. Ct. 1070; and *Beal v. Missouri Pacific Railroad Corp.* (1941), 312 U. S. 45, 51, 3d par., 85 L. ed. 577, 580, r. col., 3d par., 61 S. Ct. 418.

[77] (1963), 372 U. S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801.

10, par. XIV) of whatever efficacy they may have previously enjoyed:

> To date, all attempts by the informed, civically and militant electorate and an aroused public to have the General Assembly to reapportion the Congressional Election Districts so as to more nearly equalize their population have been without success. A contributing, if not the, cause of this situation is the fact that the State legislature is chosen on the basis of State election subdivisions inequitably apportioned in a way similar to those of the Congressional districts. That the issues of State and Congressional apportionment are thus so interdependent and interrelated that it is to the interest of the State legislature to perpetuate the inequitable apportionment of both State and Congressional Election Districts. Consequently, there are no practical opportunities for the plaintiffs and the people of Georgia for exerting their political weight at the polls. Georgia has no initiative and referendum.

Today, these practical political opportunities exist and are awaiting utilization by "the informed, civically and militant electorate and an aroused public". Nevertheless, the Appellants ignore these conventional remedies and seek relief from this Court, which if granted, would thrust it into an unseemly conflict with the Congress.

Some enthusiasts for court ordered congressional redistricting, including the Appellants (R. 39, 206 F. Sup. 279), urge the creation of districts which do not vary below 85 percent or above 115 percent of the state population norm. Appellees' Exhibit No. 2 (R. 187-200) reveals that only nine states[78] satisfy this criteria, while

[78] Iowa, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, North Dakota and Rhode Island.

the remaining thirty-three states,[79] having congressional districts, fail to qualify.

The Appellees' Exhibits (R. 79-139) and the findings of the lower court[80] clearly illustrate that the form of congressional districting complained of in Georgia is not exotic, but epitomizes a national practice. Furthermore, the figures in these Exhibits do not tell the whole story because they do not show the gerrymander, a common method of districting in many states. This big picture is significant because any direct change by the Court in this area would trigger the rapid institution of widespread redistricting litigation which would place the very existence of the present membership of the National House of Representatives in jeopardy.

However, in **Baker v. Carr** this Court has set in motion a great engine designed to give the urban areas of the Nation a far greater influence in their state legislatures, an influence which obviously will result in the reshaping of congressional districts according to population. Through this reaction the Appellants will achieve their ends. But, here they seek to catapult this Court into an area constitutionally insulated against judicial interference and involving the most sensitive and delegate relationships with the Congress. In recognition of this, the Court has wisely preserved **Colegrove** and is properly leaving congressional redistricting to reapportioned state legislatures.

These matters involve the internal functioning of a coordinate department, and regard for the separation of

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[79] Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

[80] Record, p. 41, 2d par., 206 F. Supp. 280, l. col., 2d par.

powers, if nothing else, should lead this Court to respect the internal autonomy of the Congress. The traditional deference of this Court for the Congress and the well established principles of equity demand the affirmance of the judgment of the lower court under the circumstances of this case.

II.

THIS APPEAL SHOULD BE DISMISSED ON THE GROUND THAT THE MATTERS IN CONTROVERSY HAVE BECOME MOOT. IN ANY EVENT, THIS APPEAL SHOULD BE DISMISSED ON THE GROUND THAT THE RELIEF SOUGHT AS TO THE CONGRESSIONAL ELECTION TO BE HELD ON NOVEMBER 3, 1964, IS PREMATURE BECAUSE OF THE LIKELIHOOD THAT THE STATE WILL AFFORD INTERIM RELIEF.

A. Mootness.

The immediate object of the Complaint in this case was to require congressional redistricting prior to the holding of the General Election on November 6, 1962, or, in the alternative, to require the election of Representatives on a state-at-large basis in the General Election. The Election has now been held and the Representatives of the people of Georgia have been elected for the succeeding two years and, therefore, the immediate controversy between the parties has become moot. There are no acts to restrain at the present time and the other relief sought by the Appellants would have no immediate effect because Georgia's congressional representation has been fixed for the 1963-64 term.

Nevertheless, the Appellants attempt to maintain an active controversy by seeking injunctive and declaratory relief aimed at the General Election to be held on No-

vember 3, 1964, and subsequent elections. However, the seeking of this additional relief does not rescue the appeal from its newly acquired theoretical status because the appeal now only presents an abstract question divorced from any presently existing right or actual controversy. This mootness is further intensified by the probability that the state legislature will afford the relief sought, and the possibility that the Appellants may be ineligible to vote in subsequent general elections through a change in residence or otherwise.[81] What the Appellants really seek at this time is an advisory opinion. Several cases are apposite to illustrate this point.

United Public Workers v. Mitchell[82] concerned an action to enjoin the members of the United States Civil Service Commission from enforcing against plaintiffs a certain provision of the Hatch Act, as being repugnant to the Federal Constitution, and for a judgment declaratory of the unconstitutionality of such provision. Certain of the the plaintiffs had joined in the institution of the action because they desired to act contrary to the rule against political activity, although they had not violated it.[83] In other words, they merely presented an abstract question. In responding to such abstraction, this Court stated that:[84]

> As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions," are requisite. This

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[81] This possibility is analogous to the possibility that a plaintiff may not be a candidate in future elections. *Michael v. Cockerell* (C. C. A.-4th-1947), 161 F. 2d 163, 164, f. col., 2d par.

[82] (1947), 330 U. S. 75, 91 L. ed. 754, 67 S. Ct. 556.

[83] Id., 330 U. S. 88, 91 L. ed. 766, l. col.

[84] Id., 330 U. S. 89, 1st par., 91 L. ed. 766, r. col., 2d par.

is as true of declaratory judgments as any other field. These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution. . . .

The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.

The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their juris-

diction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority. No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations. **Watson v. Buck**, supra (313 U. S. p. 400, 85 L. ed. 1423, 61 S. Ct. 962, 136 A. L. R. 1426). We should not take judicial cognizance of the situation presented on the part of the appellants considered in this subdivision of the opinion. These reasons lead us to conclude that the determination of the trial court, that the individual appellants, other than Poole, could maintain this action, was erroneous.

In **Communist Party v. Subversive Activities Control Board**,[85] this Court again recognized that "Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated."[86]

Richardson v. McChesney[87] concerned a writ of error to review a state court decree refusing to require a state official, when certifying the names of nominees for Congress to the clerks of the various county courts, to proceed under the State Congressional Apportionment Act of 1882, rather than under the State Apportionment Act of 1890.

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[85] (1961), 367 U. S. 1, 6 L. ed. 2d 625, 81 S. Ct. 1357. See also *International Longshoremen's and Warehousemen's Union v. Boyd* (1954), 347 U. S. 222, 223, last par., 98 L. ed. 650, 652, l. col., last par., 74 S. Ct. 447.

[86] 367 U. S. 71, 2d par., 6 L. ed. 2d 674, l. col., last par.

[87] (1910), 218 U. S. 487, 54 L. ed. 1121, 31 S. Ct. 43.

The appellant contended that the 1890 Act was invalid because it failed to conform to federal congressional reapportionment acts requiring that congressional districts be of contiguous territory containing as nearly as practicable an equal number of inhabitants.

Without considering the merits, this Court dismissed the writ of error, stating in part that:[88]

> The matter which the defendant McChesney, as secretary of the commonwealth of Kentucky, is to be prohibited from doing relates solely to an election to be held in November, 1908, and the thing which he is to be required to do relates only to the same election. The election to be affected by a decree, according to the prayer of the bill, has long since been held, and the members of Congress were, in November, 1908, elected under the apportionment act of 1890. They were, as we may judicially know, admitted to the respective seats, and, as we may also take notice, their successors have been elected according to the same scheme of apportionment. The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances there is nothing but a moot case. **Mills v. Green**, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; **Jones v. Montague**, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611.
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> The duty of the court is limited to the decision of actual pending controversies, and it should not pronounce judgment upon abstract questions, however such opinion might influence future action in like circumstances.

This dismissal is significant because the appellant had alleged that the 1890 Act violated the requirements of the federal congressional reapportionment acts and, hence, the

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[88] Id., 218 U. S. 492, 3d par., 54 L. ed. 1122, 1. col., last par.

alleged violation would recur at each election of Representatives so long as the acts remained in force. Nevertheless, this Court determined the issue to be moot.

The decision in **Mills v. Green**,[89] relied upon in **Richardson**, stated in part that:[90]

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

In **Fortson v. Cook**[91] and **Turman v. Duckworth**,[92] the appellants sought declaratory and injunctive relief aimed at the invalidation of Georgia's county unit system for tabulating votes in party primaries. This Court in dismissing the appeals cited **United States v. Anchor Coal Company**[93] as authority for dismissal on the ground of mootness, irrespective of the obvious application of the county unit system to future primaries.[94]

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[89] (1895), 159 U. S. 651, 40 L. ed. 293, 16 S. Ct. 132.

[90] Id., 159 U. S. 653, last par., 40 L. ed. 293, r. col., last par.

[91] (1946), 329 U. S. 673, 91 L. ed. 596, 67 S. Ct. 21, reh. den. (1946), 329 U. S. 829, 91 L. ed. 703, 67 S. Ct. 296.

[92] Id.

[93] (1929), 279 U. S. 812, 73 L. ed. 971, 49 S. Ct. 262.

[94] This point was touched upon by Justice Rutledge in his opinion. See 329 U. S. 677, 2d par., 91 L. ed. 597, r. col., last par.

In **Hume v. Mahan,**[95] the district court held a Kentucky congressional redistricting act void for want of a good-faith effort to comply with federal statutory requirements of practical equality of population and compact territory. On appeal, this Court in a *per curiam* opinion held "Decree reversed and cause remanded with directions to dismiss the bill of complaint".[96] Since that case was not brought to the Court until after the election had been held, the Court cited not only **Wood v. Broom,**[97] but also directed dismissal for mootness, citing **Brownlow v. Schwartz.**[98]

In view of these authorities, it is clear that this appeal no longer presents a controversy susceptible of judicial determination.

B. Prematurity as to the 1964 Congressional Election.

In **Remmey v. Smith,**[99] the plaintiffs sought to have the Pennsylvania Apportionment Act of 1921 declared unconstitutional and to compel the state legislature to reapportion state representative and senatorial districts. The three-judge district court held that the suit was premature and dismissed for want of equity. In its opinion, the court stated in part that:[100]

> The determination which the plaintiffs would have us make lies in that extremely sensitive field, the relation of the powers of the National Government to those of the States. Here, of all places, a federal court

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[95] (D. C.-E. D. Ky.-1932), 1 F. Supp. 142, 149, r. col., 1st par.

[96] 287 U. S. 575, 77 L. ed. 505, 53 S. Ct. 223.

[97] 287 U. S. 1, 77 L. ed. 131, 53 S. Ct. 1.

[98] 261 U. S. 216, 67 L. ed. 620, 43 S. Ct. 263. See also comment on that case in *Baker v. Carr*, at 369 U. S. 202, 1st par., 7 L. ed. 2d 676, r. col., 1st par.

[99] (D. C.-E. D. Pa.-1951), 102 F. Supp. 708.

[100] Id., 102 F. Supp. 711, l. col., 2d par.

should tread warily and with great circumspection and should forego any action where relief may be furnished by the State. This court should not intervene where an apparent, but untried, remedy may lie in the Courts of the Commonwealth of Pennsylvania. Those Courts may declare the present operation of the Apportionment Act of 1921 to be unconstitutional under the Pennsylvania Constitution. . . . **Moreover, and this we deem to be a most cogent circumstance, the 1951 General Assembly of the Commonwealth of Pennsylvania is in session. This is the first General Assembly convened following the United States decennial census of 1950. The 1951 General Assembly has the opportunity to act in respect to this most important matter and, if it does, may pass a reapportionment act which will meet every constitutional requirement. Under these circumstances action by this court at this time would, at best, be premature.** (Emphasis supplied.)

Upon appeal this Court entered a *per curiam* opinion stating in part that "The motion to dismiss is granted and the appeal is dismissed for the want of a substantial Federal question."[10]

The dismissal granted by this Court in **Remmey** is even more appropriate in this case because it involves congressional redistricting in contrast with state legislative reapportionment, and, furthermore, because there is a stronger likelihood in this case that the state legislature will afford the relief sought by the Appellants. Hence this appeal should be dismissed on the ground that the relief sought by the Appellants as to the congressional election to be held on November 3, 1964, is premature.

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[10] *Remmey v. Smith* (1952), 342 U. S. 916, 96 L. ed. 685, 72 S. Ct. 368. See also comment on that case in *Baker v. Carr*, at 369 U. S. 235, 1st par., 7 L. ed., 2d 696, 1. col.

CONCLUSION.

The Judgment of the United States District Court for the Northern District of Georgia, sought to be reviewed in this cause, should be affirmed; or, in the alternative, the appeal in this cause should be dismissed, (a) on the ground that the matters in controversy in this action and upon this appeal have become abstract and moot by virtue of the holding of the General Election on November 6, 1962, and the election therein of the Representatives of the people of Georgia in the House of Representatives of the Congress of the United States, or (b) on the ground that the relief sought as to the congressional election to be held on November 3, 1964, is premature because of the likelihood that the State of Georgia will afford interim relief.

Respectfully submitted,

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